

DR CHAN CHOO LIP

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v.

MALAYSIAN MEDICAL COUNCIL & ANOR

HIGH COURT SABAH & SARAWAK, KUCHING

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RHODZARIAH BUJANG JC

[JUDICIAL REVIEW NO: JR-6-2010-III]

4 JUNE 2010

ADMINISTRATIVE LAW: *Judicial review - Certiorari - Medical profession - Application to quash decision of Malaysian Medical Council to inquire into misconduct of medical practitioner - Practitioner acquitted of charges of misconduct by Court of Law - Whether could be subjected to inquiry before Council - Whether acquittal binding on Council - Autrefois acquit, doctrine of - Whether applicable - Whether Council's decision amenable to judicial review*

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PROFFESIONS: *Medical practitioners - Misconduct - Statutory Inquiry - Malaysian Medical Council, power to conduct inquiry - Applicant acquitted of charges of misconduct by Court of Law - Whether could be subjected to inquiry before Council - Whether acquittal binding on Council - Autrefois acquit, doctrine of - Whether applicable*

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The applicant, a practicing doctor and a member of the first respondent Malaysian Medical Council ('the Council'), had been charged with but acquitted of 33 counts of offences under the Poisons (Psychotropic Substances) Regulations 1989 and the Drugs and Cosmetic Regulations 1984. The acquittal notwithstanding, the Council sought to institute an inquiry against the applicant pursuant to the powers given it under the Medical Act 1971. The applicant argued that such inquiry, considering his acquittal and the authorities of *Harry Lee Wee v. Law Society of Singapore* ('Harry Lee's case'), *Connelly v. Director of Public Prosecutions* ('Connelly's case') and *Hunter v. Chief Constable of West Midlands & Another* ('Hunter's case'), was an abuse of process and of the Council's powers, and further amounted to a collateral attack on the decision of the criminal court, and in the circumstances applied for leave to issue a writ of certiorari to quash the said decision of the Council. It was not in dispute that these authorities had among others decided that the doctrine of *autrefois acquit/convict* applied to a disciplinary proceeding conducted under a statutory Code. Be that as it may, before the learned Judicial Commissioner, arguments were put forth by the Council that the applicant had no *locus standi* to institute

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- A the leave application, and in any case, relying on *Peter Ziderman v. General Dental Council* ('Peter's case') and *Regina v. Statutory Committee of the Pharmaceutical Society of Great Britain*, ('Regina's case'), that there was in this case no reviewable decision that could be made amenable to judicial review.
- B **Held (dismissing application):**
- C (1) *Harry Lee's* case ought to be distinguished as that decision concerned a double disciplinary proceedings instituted against the appellant therein, and so too the principle enunciated in *Connelly's* case for being made in relation to criminal proceedings which had been instituted twice notwithstanding that the offences were committed in the same transaction. Likewise, *Hunter's* case is distinguishable because the issue there was whether estoppel applied in respect of a claim for damages founded upon a criminal action in which the accused had been acquitted. (paras 12 & 13)
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- E (2) Bearing in mind *Peter's* case (disciplinary proceedings held against a dentist after his conviction in court was not to punish him a second time for the same offence but to protect the public who might come to him as patients), *Regina's* case (a statutory committee could enquire into the misconduct of students of a Pharmacy School after their conditional acquittal in court) and *Spencer Bower, Turner and Handley on The Doctrine of Res Judicata* (neither a conviction nor an acquittal could bar disciplinary proceedings based on the same conduct since the purpose of the proceedings was not to punish but to maintain the standards of the profession) – the acquittal by the Sessions Court of the applicant herein is not a bar to the disciplinary proceedings intended to be initiated against him. There is therefore no decision which is adverse to the applicant that should be further examined and argued. On the same reasoning, the applicant lacks the *locus standi* to make this leave application. (paras 11, 15 & 16)
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- H (3) The Medical Act 1971 is designed to regulate the conduct and practice of its members. The medical profession, being a professional body, is required to maintain a high standard of practice, ethics and discipline for the protection of the public that it serves. The Council is therefore entitled to enforce the rules regulating the conduct and practice of its members in the
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interest of not just its members but the public as well. Thus, the acquittal or conviction of any of its members in the court of law for criminal offences should not be binding on the Council. (para 19) A

Case(s) referred to:

Connelly v. Director of Public Prosecutions [1964] 2 All ER 401 (**dist**) B

Harry Lee Wee v. Law Society of Singapore [1984] 1 LNS 77 PC (**dist**)

Hunter v. Chief Constable of West Midlands & Another [1981] 3 All ER 727 (**dist**)

Mohamed Yusoff Samadi v. Attorney General [1974] 1 LNS 97 HC (**refd**) C

Peter Ziderman v. General Dental Council [1976] 1 WLR 330 (**fol**)

Regina (Redgrave) v. Commissioner of Police of the Metropolis [2003] 1 WLR 1136 (**refd**)

Regina v. Statutory Committee of the Pharmaceutical Society of Great Britain, Ex parte Pharmaceutical Society of Great Britain [1981] 1 WLR 886 (**fol**)

Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors [2006] 1 CLJ 927 CA (**refd**) D

Legislation referred:

Rules of the High Court 1980, O. 53 rr. 2(4), 3(6)

Other source(s) referred to:

Spencer Bower, Turner and Handley The Doctrine of Res Judicata, 3rd edn, pp 173-174 E

For the applicant - Thomas Shankar Ram; M/s Thomas Shankar Ram & Co

For the respondents - See Chee How; M/s Baru Bian

For Federal Attorney-General's Chambers - Azizah Hassan DPP (Mohd Taufik Mohd Yusoff SFC with him) F

Reported by Wan Sharif Wan Ahmad

JUDGMENT G

Rhodzariah Bujang JC:

[1] The applicant is a doctor practicing under the name and style of Lee Clinic in a small town of Serian near Kuching. He is registered under the Medical Act 1971 and Medical Regulations 1974. In 2008 he was charged with 33 counts of offences under the Poisons (Psychotropic Substances) Regulations 1989 and the Drugs & Cosmetic Regulations 1984. These charges were preferred against him following an inspection conducted by a pharmacist H

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A team from the Ministry of Health headed by one Puan Rabiawati binti Omar. In the main, the complaint against the applicant was he allegedly did not keep a proper record of the psychotropic pills in his clinic. By a court order dated 28 January 2009 and on 27 August 2009 respectively, he was acquitted of all 33 charges.

B [2] However, before these court orders were made against the applicant, by a letter dated 20 November 2008, the Malaysian Medical Council wrote to the applicant to inform him that the Malaysian Medical Council would be holding an inquiry against him on 26 February 2009 based on a report forwarded by the Sarawak Deputy Director of Health (Pharmacy).

C [3] There is evidence shown that this proposed inquiry was postponed pending the conclusion of the criminal charges against him and *vide* a letter dated 19 March 2010 the Malaysian Medical Council has informed the applicant their decisions to conduct an inquiry into his “alleged infamous conduct in a professional respect based on a Complaint Information by George Wong Lai Khai @ Rusdy in a letter dated 16 June 2008 from the Ministry of Health, Malaysia”. The applicant has now filed an application for leave to issue a writ of *certiorari* to quash the decision of the Malaysian Medical Council (the 1st respondent) to hold the said inquiry.

D [4] If I may summarize, the grounds of his application as shown in his affidavit in support is that since the proposed inquiry is based on the same raid by the said pharmacist team which resulted in the 33 charges being framed against him and in view of his acquittal of all 33 charges, the decision by Malaysian Medical Council to hold the inquiry is, *inter alia*, an abuse of the process and their powers and it amounts to a collateral attack on the decision of the criminal court in acquitting him of the 33 charges. He further contended that the decision of the criminal court must be respected and accepted as final by the professional body that has supervisory jurisdiction over the applicant and of which he is a member.

H **Is The Application For Leave Frivolous?**

I [5] My role, at this stage, is only to consider if the application is frivolous as for example whether it was made out of time or against a person or body who cannot be sued. I shall not go into the merits of the case. (see *Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors* [2006] 1 CLJ 927 at p. 943).

[6] The respondents have objected to this application firstly, on the ground of delay, secondly, that there was no 'reviewable decision' and thirdly, the applicant has no *locus standi* to make this application. Lastly, and fourthly, that he has failed to exhaust the remedy available to him under the Medical Act and its Regulations.

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Delay

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[7] I see no merit in the argument of the respondents that the applicant should have made this application upon receipt of the first letter on 20 November 2008 and by making this application now he is outside of the 40 days period prescribed by O. 53 r. 3(6) of the Rules of the High Court 1980. This is simply because that first letter and the proposed first inquiry had been overtaken by events ie the issuance of the second letter and the proposed second inquiry. But, more importantly, the whole basis of the applicant's application for leave now rests on the fact that the Sessions Court had acquitted the plaintiff and therefore the inquiry should not be held. The decision of the Sessions Court only came after the first letter and in the circumstance the 40 days period under O. 53 r. 3(6) of the Rules of the High Court 1980 should run from the date of the second letter ie, 19 March 2010. This application having been filed on 16 April 2010, the applicant is well within the time limited for him to make it.

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No Reviewable Decision

[8] The respondents argued that the decision to hold the inquiry is not a reviewable decision and cited firstly, O. 53 r. 2 of the Rules of the High Court 1980.

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[9] Order 53 r. 2 provides that,

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(4) Any persons who is **adversely affected** by the **decision** of any public authority shall be entitled to make the application.

They submitted that the 2nd respondent has yet to make a decision which is adverse against the applicant so this application is infact premature.

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[10] Mr. Shankar Ram's counter argument on this is that in view of his client's acquittal in the Sessions Court, the holding of the inquiry is prejudicial to his client. One of the cases cited by him is that of the Privy Council, *Harry Lee Wee v. Law Society of Singapore* [1984] 1 LNS 77 in which it was held that the doctrine of *autrefois*

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- A *acquit* and *convict* is applicable to disciplinary proceedings under a statutory code by which a profession is governed. Citing *Connelly v. Director of Public Prosecutions* [1964] 2 All ER 401, the Privy Council held that the appellant in that case is entitled to rely on the order made against him in the first proceedings as a complete bar to
- B further disciplinary action against him in the second proceedings. In other words, they are stopped from bringing this action against his client.

- C [11] The respondents too have their own case authorities to say otherwise and one of it is also a Privy Council decision, *Peter Ziderman v. General Dental Council* [1976] 1 WLR 330 which involves a dentist who was convicted by the court and it was held by the Privy Council that the disciplinary proceedings held after his conviction is not to punish him a second time for the same offence
- D but to protect the public who may come to him as patients and to maintain the high standards and good reputation of an honourable profession. In the same submission, the respondents' counsel also quoted Spencer Bower, Turner and Handley on *The Doctrine of Res Judicata*, 3rd edn at pp. 173-174. I find the said quotation helpful
- E herein and have taken the liberty to reproduce it below:

- F ... Neither a conviction nor an acquittal will bar disciplinary proceedings based on the same conduct because the purpose of such proceedings is not to punish, but to maintain the standards of the profession. (*Re Weare* [1893] 2 QB 439, CA; *Allinson v. General Council of Medical Education and Registration* [1894] 1 QB 750, CA; *Ziems v. Prothonotary of the Supreme Court of New South Wales* [1957] 97 CLR 279; *Re a Medical Practitioner* [1959] NZLR 784, CA; *New South Wales Bar Association v. Evatt* [1968] 117 CLR 177 at 183-4). In *Re a Medical Practitioner*, North and Clearly JJ said:
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- H The Council may be concerned with many kinds of conduct which cannot constitute offences punishable by law, such as improper advertising, the commission of adultery with a patient, and unethical practices; when it becomes concerned with conduct which constitutes an offence, it is not for the purpose of punishing that conduct as an offence against the public, which is the purpose of the criminal law, but because it is conduct which may show that the practitioner concerned is no longer fit to continue to practice the profession ... *we were not referred to any case in which ... the pleas of autrefois acquit or autrefois convict had succeeded except before a Court or judicial tribunal claiming jurisdiction to punish the offence charged as being a breach of the criminal law.* (emphasis added).
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In addition, my attention was drawn to a number of decisions both decided in Malaysia and in England where the point made by the counsel above was repeated and as a reference point I would list out these cases below:

- (i) *Mohamed Yusoff bin Samadi v. Attorney General of Singapore* [1974] 1 LNS 97 of the judgment. A

In my view, no principle of law precludes a man who has been acquitted or convicted upon a set of facts alleged to constitute an offence being subsequently subjected upon the same facts to disciplinary action by a domestic tribunal. B

- (ii) *Regina (Redgrave) v. Commissioner of Police of the Metropolis* [2003] 1 WLR 1136 @ pp. 1144B-1146D. C

- (iii) *Regina v Statutory Committee of the Pharmaceutical Society of Great Britain, Ex parte Pharmaceutical Society of Great Britain* [1981] 1 WLR 886 at p. 893G-H. D

[12] The respondents' counsel had also distinguished the Privy Council's decision in *Harry Lee's* case (*supra*), and to which I agree and that is, that decision concerns a double disciplinary proceedings instituted against the appellant. It is obviously not the case here. As for the principle established in *Connelly's* case (*supra*) as stated above, it was made in relation to criminal proceedings instituted against him twice for two offences – one armed robbery and the other for murder which was committed in the same transaction. E

[13] Mr. Shankar Ram had also referred to the case of *Hunter v. Chief Constable of West Midlands & Another* [1981] 3 All ER 727 a House of Lords' decision which he said entitles the applicant to launch his 'pre-emptive strike' against the respondents but again there is an apparent distinguishing factor present, in that the issue in that case was whether estoppel applies in respect of a civil action for damages founded upon a criminal action in which the accused person had been acquitted. F

[14] So, just like in *Harry Lee's* and *Cornelly's* cases (*supra*) the principle established in the cited cases is not applicable here. G

[15] On the other hand the case authorities referred to by the respondents' counsel as I mentioned earlier are straight on the point. I wish to especially highlight the decision in the H

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- A *Pharmaceutical Society of Great Britain (supra)* in which Lord Lane CJ held that the “*maxim nemo debet bis puniri pro uno delicto*” (ie no one should be punished twice for the same offence) does not preclude a statutory committee from enquiring into the misconduct of the students of London School of Pharmacy after they have
- B been conditionally discharged from a conviction of unlawfully wounding another student. His Lordship said this is because the offence and findings of a disciplinary tribunal differed from those of a criminal court and such a tribunal was not a court of competent jurisdiction.
- C [16] Based on these authorities, I am satisfied that the acquittal by the Sessions Court of the applicant is not a bar to the disciplinary proceedings intended to be initiated against him. There is therefore no decision which is adverse to him which needs to
- D be further examined and argued. On the same reasoning the applicant lacks the *locus standi* to make this leave application and it must be refused.
- E [17] Having arrived at this decision at this juncture I see no necessity to discuss the last ground of objection of the respondents as stated earlier.
- F [18] In conclusion, I would dismiss the application for leave with costs to be taxed unless agreed and end this judgment with this observation.
- G [19] The Medical Act is designed to regulate the conduct and practice of its member. The medical profession being a professional body is required to maintain a high standard of practice, ethics and discipline for the protection of the public that it serves. The
- H Medical Council is therefore entitled to enforce the rules regulating the conduct and practice of its members in the interest of not just its members but the public as well. Thus, the acquittal or conviction of any of its members in the court of law for criminal offences should not, given their supervisory and regulatory task, be binding on the Council.
- I [20] In this regard, the respondents’ Code of Criminal Conduct under the title “*Convictions In A Court of Law*” is pertinent and it provides as follows:

In considering convictions the *Council is bound to accept the determination of any court of law as conclusive evidence that the practitioner was guilty of the offence of which he was convicted*, Practitioners who face a criminal charge should remember this if they are advised to plead guilty, or not to appeal against a conviction merely to avoid publicity or a severe sentence. It is not open to a practitioner who has been convicted of an offence to argue before the Preliminary Investigation Committee or the Malaysian Medical Council *that he was in fact innocent*. It is therefore unwise for a practitioner *to plead guilty in a court of law to a charge to which he believes that he has a defence*. (emphasis added).

[21] As rightly pointed out by the respondents' counsel, only convictions by the court are binding on the Council but not acquittals and the reason is obvious. When a conviction is entered, there must already be proof beyond reasonable doubt of the offence alleged but an acquittal can be had for a myriad of reasons both technical and substantive. Thus the rationale behind the Council's power to further enquire into the alleged misconduct of its member, despite the acquittals. The above represent my own view, of course, but in coming to it, I am enlightened by the quotation made in the *Pharmaceutical Society of Great Britain's case (supra)* from the decision of *Viscount Simonds in Simpson v. General Medical Council* (Privy Council), *The Times*, 9 November 1955 in which His Lordship said this:

The Medical Acts are designed at the same time to protect the public and to maintain the high professional and ethical standards of an honourable calling. If a practitioner, having committed the grave offences of which the appellant has been guilty, can upon such a plea successfully resist the charge of infamous conduct and the erasure of his name from the register, the public will lack their proper protection and the honour of the profession may be endangered by the continued practices of one who can still claim to be of their number.

[22] Thus, although one would sympathize with the applicant for having to go through a second round of hearing, there is a larger interest at stake – that of the public.

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